

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

**BURNELL DIXON II,
Complainant,**

and

**UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN,
Respondent.**

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) Charge No: 2006SF3248
) EEOC No: N/A
) ALS No: S07-585
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RECOMMENDED ORDER AND DECISION

On August 3, 2007, Complainant filed a Complaint on his own behalf against Respondent alleging that Respondent discriminated against him on the bases of race, age and sex and unlawfully retaliated against him. This matter now comes before me on Respondent's motion for summary decision. Respondent filed its motion, along with affidavits and exhibits, on May 13, 2009; Complainant filed a response to the motion, along with an affidavit and exhibits, on July 14, 2009; and Respondent filed a reply on July 23, 2009.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. It is, therefore, named herein as an additional party of record.

CONTENTIONS OF THE PARTIES

Respondent contends that the Commission lacks jurisdiction over this Complaint because the underlying Charges of race, age and gender discrimination were not filed within the statutory 180 days of the alleged discriminatory acts as required by Section 7A-102(A)(1) of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and that the undisputed facts show that Complainant cannot prove a *prima facie* case of retaliation.

Complainant contends that his Charges were timely filed and that issues of fact remain as to his *prima facie* showings of discrimination and retaliation.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documents submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Complainant filed a Charge of Discrimination with the Illinois Department of Human Rights (Department), designated Charge number 2006SF3248, on August 3, 2006, signed and notarized on July 26, 2006. The Charge alleged that Respondent subjected Complainant to race, age, and gender discrimination when it failed to hire Complainant on November 11, 2005. The Charge further alleged that Respondent retaliated against Complainant when it failed to hire him on February 27, 2006, because he opposed unlawful discrimination in November, 2005.
2. Complainant filed an amendment to the Charge, signed and notarized October 23, 2006, alleging that Respondent discriminated against him on the bases of race, age and gender when it failed to hire him in March, 2006. The Charge also alleged that Respondent subjected Complainant to retaliation by refusing to hire him in March, 2006, after he opposed unlawful discrimination in December, 2005.
3. Respondent filed a verified answer to the Complaint on October 4, 2007.
4. On December 20, 2005, Complainant filed a complaint with Respondent on Respondent's own internal complaint information form complaining that he believed he was being discriminated against based on his race, age and gender by Debbie Long of Respondent's Housing Undergraduate Department. The complaint stated that Long refused to hire him as late as November, 2005, despite that he had received a perfect score (100) on the civil service exam, that he had managerial experience, that he previously possessed a food sanitation license and that he had two college degrees.

5. Complainant applied for the position of Kitchen Helper in the Undergraduate Housing Department of Respondent around February 27, 2006. Complainant was not hired for the position.
6. Long was responsible for hiring for the open job position of Kitchen Helper in the Undergraduate Housing Department in February, 2006.

DETERMINATION

This case must be dismissed as the Commission lacks jurisdiction over the race, age and gender claims and the March, 2006, retaliation claim; and there is insufficient evidence to create a question of fact regarding whether Respondent's proffered reason for failing to hire Complainant on February 27, 2006, was pretext.

CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction over Complainant's allegations of race, age and gender discrimination.
2. The Commission lacks jurisdiction over Complainant's allegation that he was subjected to retaliation in March, 2006.
3. There is insufficient evidence to create material issues of fact as to whether Respondent's proffered reason for failing to hire Complainant on February 27, 2006, was pretextual.

DISCUSSION

Preliminary Issues

Before moving into an analysis of the summary decision motion, there are two preliminary issues concerning the summary decision pleadings that must be addressed. On July 14, 2009, Complainant filed a motion to strike the affidavits of Respondent's employees, Deborah Long and Linda White, arguing that their respective affidavits were untrue and that each contained information not personally known to them. This motion is denied as lacking merit.

On July 23, 2009, Respondent filed a motion to strike Complainant's affidavit and exhibits, arguing that Complainant's affidavit did not contain the proper language and that Complainant's averments contained no facts and instead proffered conclusory statements. Complainant's affidavit is made under oath along with a notarization. I find the affidavit and averments to be sufficient for the purpose of this motion; therefore, the motion to strike is denied.

Race, Age and Gender Allegations

Respondent contends that Complainant's allegations of race, age and gender discrimination were untimely filed and must be dismissed for lack of jurisdiction. Respondent points to Complainant's *Charge of Discrimination*, dated July 26, 2006. In that Charge, Complainant alleges that Respondent failed to hire him on November 11, 2005. On the face of the Charge is an Illinois Department of Human Rights *received* stamp, dated August 3, 2006. Respondent argues that the date the alleged discriminatory act occurred is outside of the 180-day filing period, as required by the Act.

Complainant attempts to defend the timeliness of his claim by maintaining that the original charge was filed with the Department on or about May 8, 2006. There is absolutely no support in the record for Complainant's position. The operative Charge is attached to the Complaint and the Complaint specifically references the Charge as having been filed with the Department *on July 26, 2006*.

Pursuant to section 7A-102(A)(1) of the Act, a charge of discrimination must be filed "within 180 days after the date that a civil rights violation allegedly has been committed." That 180-day period is a jurisdictional requirement. *Larrance v. Human Rights Commission*, 166 Ill. App. 3d 224, 519 N.E.2d 1203 (4th Dist. 1988); *Pickering v. Illinois Human Rights Commission*, 146 Ill. App. 3d 340, 496 N.E.2d 746 (2d Dist. 1986). Here, the filing date with the Department is clearly indicated as August 3, 2006, which is 262 days after the November 11, 2005 date of the alleged discriminatory act; and even if the July 26, 2006 date is accepted as the filing date,

the Charge is still untimely filed. Thus, Complainant's Charge as to the allegations of race, age and gender discrimination is untimely and the Commission lacks jurisdiction over these allegations.

Complainant's race, age and gender amendments to the Charge have the same result. The amended allegations in the October 23, 2006 *Charge of Discrimination* are separate and independent of the November 11, 2005 allegations. Here, Complainant alleges that Respondent failed to hire him in March, 2006 based on his race, age and gender. See, *Robinson v. Ill Human Rights Commission*, 201 Ill.App.3d 722, 559 N.E.2d 229 (1st Dist. 1990) (amendments do not relate back to the date of the original charge filing if they set forth different claims based on a different set of facts). The Charge was signed and notarized on October 23, 2006, 206 days following the alleged discriminatory act. Thus, Complainant's allegations of race, age and gender discrimination here are also untimely and the Commission lacks jurisdiction over these charges.

Retaliation Allegations

Complainant's October 23, 2006 Charge further alleges that he opposed unlawful discrimination to Pam Pirtie of Respondent's Office of Equal Opportunity and Access in December, 2005, and that Respondent failed to hire him in March, 2006. Because the Charge was signed and notarized on October 23, 2006, 206 days after the alleged discriminatory act, these allegations, too, are untimely and the Commission lacks jurisdiction over these charges.

Finally, in his July 26, 2006 Charge, Complainant alleges that he was a victim of unlawful retaliation when Respondent failed to hire him on February 27, 2006, because he opposed unlawful discrimination in November, 2005.

The Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Act. In a retaliation case, Complainant must first establish a *prima facie* case of unlawful retaliation (See, for example, *Foley v. Illinois Human Rights Commission*, 165 Ill. App. 3d 594, 519 N.E.2d 129, 116 Ill. Dec. 538 (5th Dist. 1988)). Then, the

burden shifts to Respondent to articulate a non-discriminatory reason for the adverse action taken against Complainant. If Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case and the Complainant is required to prove by a preponderance of the evidence that Respondent's articulated non-discriminatory reason for the adverse action is a pretext for unlawful discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct 1089, (1981). To prove a *prima facie* case, Complainant is generally required to prove that: (1) he engaged in a protected activity; (2) Respondent's decision-maker, who was aware of said activity, subsequently took an adverse action against him; and (3) a causal connection exists between the protected activity and Respondent's adverse action. (See, for example, *Hoffelt v. Illinois Dept of Human Rights*, 367 Ill. App.3d 628, 867 N.E.2d 14, (1st Dist. 2006); *Carter Coal Co. v Human Rights Commission*, 261 Ill.App.3d 1, 633 N.E.2d 202, (5th Dist 1994)).

Here, Complainant alleges that he opposed unlawful discrimination in early November, 2005, when he filed an internal complaint with Respondent's equal employment office. Complainant submits a copy of an internal complaint information form signed and dated December 20, 2005, indicating that he complained to Respondent about discrimination stemming from his failure to be hired. Respondent does not dispute the internal form. Complainant then maintains that Deborah Long, Respondent's Manager, retaliated against him when she failed to hire him on February 27, 2006. While Respondent denies that Long was aware of the internal complaint, for purposes of summary decision, this issue must be decided in favor of Complainant. Respondent does not dispute that it sought to fulfill the position of Kitchen Helper in February, 2006, and that Complainant applied, was interviewed for the job and was rejected. Therefore, Complainant has established the first two elements of his *prima facie* case of retaliation. For the third element, the short time span between the internal complaint and the hiring decision suffices to provide an inference of connectedness. *Ellis and Brunswick Corp.*, IHRC, ALS No. 1394(RRP), March 30, 1987; *St. of Ill. Dept. of Rehabilitation*,

IHRC, ALS No. 6612(S), June 29, 1995. Complainant has sufficiently established the *prima facie* elements of this retaliation claim.

Next, Respondent must meet its burden of articulating a legitimate non-discriminatory reason for its adverse action. To meet this burden, Long submits an affidavit averring that she was responsible for hiring for the open job position of Kitchen Helper in the Undergraduate Housing Department in February, 2006. Respondent presents a position description for the position of Kitchen Helper, which lists the duties and responsibilities as:

Sets up salads, desserts, condiments and beverage lines; assists cooks in preparation of food for serving; prepares salads for everyday use which do not require the application of heat; cleans tables and dishes; cleans kitchen utensils, kitchen and serving line equipment; washes dishes; assists with catering and specialty restaurants (including garnishing) as requested; maintains proper sanitation and temperature controls; takes salad and dessert leftover counts, recording on the Cook's Worksheet the amount prepared and the amount left over; labels all food items properly using nutrition cards; assists cooks as necessary (grating cheese, making sandwiches, etc); arranges and cleans produce walk-in; using knowledge off recipes, must prepare such items as coffee; serves food as required; performs other related duties as assigned.

Long avers that she received a referral list of applicants from the University's Human Resources Department on February 15, 2006, which listed nine candidates, all of whom had scored 100 on their qualifying exam. Four of the candidates expressed an interest in the position and were interviewed on February 23, 2006. Long says she selected the successful candidate, Candidate #2, for the position based on her qualifications and not based on any internal complaint that Complainant had made with Respondent. Long said that she selected Candidate #2 because the applicant had continuously worked in food service since 1992 in the Iroquois West School District preparing and serving balanced meals to students, cleaning and sanitizing work areas and equipment, stocking shelves and freezers, and working with slicers and mixers. In contrast, Long characterized Complainant's relevant work experience as being limited primarily to managerial experience in a fast food setting for a limited period of approximately one year, around 1998.

Complainant disputes Long's characterization of his relevant work experience when compared to that of the successful candidate. However, Complainant's resumes and application support Long's characterization. One of Complainant's resumes submitted to Respondent shows that he was a Manager for Burger King in Champaign, Illinois from June 1997 until September 1998; another resume indicates he was a Night Manager for Burger King in Champaign, Illinois from June 1997 until November 1999; and Complainant's application for the position indicated he was a Manager for Burger King in Champaign, Illinois from September 1, 1998 until November 1, 1999. Each of the resumes and Complainant's application for the position indicate Complainant's relevant experience as supervising employees, coordinating service, closing and balancing cash registers, making bank deposits, creating workable schedules, making sure perishables are refrigerated, supervising clean-up of food and service areas; taking inventory of food items; and hiring and terminating employees. Although the indicated dates of employment as Manager for Burger King in his resumes and application are inconsistent, the undisputed facts in the record support that Complainant's only relevant work experience was as manager for a fast food restaurant for anytime from 15 months to 2 ½ years during the time period from 1997 until 1999. Much of Complainant's argument that he was more qualified for the position is based on his own statement that he received a perfect score on the civil service exam. The undisputed facts in the record show that all of the candidates interviewed for the position also had perfect scores on the civil service examination.

Respondent submits the application of the successful candidate as an exhibit to its motion and Complainant submits nothing to dispute Long's assessment and characterization of the relevant work experience of the successful candidate as being more extensive and relevant to the job position than that of Complainant's. The Commission cannot serve as a super-personnel agency to second-guess the business decisions of an employer. *Rosman and Highland Park Lincoln Mercury*, IHRC, ALS No. 5526, March 19, 1996. It is well established that

the Commission cannot substitute its business judgment for the respondent. *Sola v. Ill. Human Rights Commission*, 316 Ill. App. 3d 528, 736 N.E. 2d 1150 (1st Dist 2000).

A motion for summary decision is to be granted when the pleadings, depositions, exhibits and affidavits on file reveal that no genuine issue of material fact exists and establish that the moving party is entitled to judgment as a matter of law. See, Section 5/8-106.1 of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and *Young v. Lemons*, 266 Ill.App.3d 49, 51, 639 N.E.2d 610 (1st Dist. 1994). In determining whether a genuine issue of material fact exists, the record is construed in the light most favorable to the non-moving party, and strictly against the moving party. *Gatlin v. Ruder*, 137 Ill. 2d 284, 293, 560 N.E.2d 586 (1990); *Soderlund Brothers, Inc., v. Carrier Corp.*, 278 Ill.App.3d 606, 614, 663 N.E.2d 1 (1st Dist 1995). A summary order is a drastic method of disposing of a case and should be granted only if the right of the moving party is clear and free from doubt. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill.2d 263, 271, 586 N.E.2d 1211 (1992); *McCullough v. Gallaher & Speck*, 254 Ill.App.3d 941, 948, 627 N.E.2d 202 (1st Dist 1993).

Although Complainant is not required to prove his case to defeat the motion, he is required to present some factual basis that would arguably entitle him to a judgment under the law. *Birck v. City of Quincy*, 241 Ill.App.3d 119, 608 N.E.2d 920, (4th Dist 1993) citing, *inter alia*, *West v. Deere & Co.*, 145 Ill.2d 177, 182, 582 N.E.2d 685, 687 (1991).

This record presents no evidence to create any genuine issues of fact as to whether Respondent's articulated reason for not hiring Complainant for the position of Kitchen Helper on February 27, 2006 was pretextual.

RECOMMENDATION

Accordingly, I recommend that this Complaint and the underlying Charge be dismissed in its entirety with prejudice.

HUMAN RIGHTS COMMISSION

ENTERED: September 17, 2009

BY: _____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section